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No. 447

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1965.

ALABAMA HIGHWAY EXPRESS, INC., BAGGETT TRANSPORTATION COMPANY, CAMPBELL SIXTY-SIX EXPRESS, INC., and GORDONS TRANSPORTS, INC.,
Appellants,
v.
UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, et al.,
Appellees.

On Appeal from the United States District Court for the Northern District of Alabama, Southern Division.

JURISDICTIONAL STATEMENT.

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ALABAMA HIGHWAY EXPRESS, INC., BAGGETT TRANSPORTATION COMPANY, CAMPBELL SIXTY-SIX EXPRESS, INC., AND GORDONS TRANSPORTS, INC., *Appellants*,

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION.

JURISDICTIONAL STATEMENT.

OPINIONS BELOW.

The opinion of the United States District Court for the Northern District of Alabama, Southern Division, is reported at 241 F. Supp. 290. The decision of the Interstate Commerce Commission there under review, is not officially reported.

Appended hereto marked Appendix A is the decision of the United States District Court for the Northern District of Alabama, Southern Division, rendered May 21, 1965; as Appendix B is the Order of that Court also entered May 21, 1965.

Appendix C is the underlying Order of Division 3 of the Interstate Commerce Commission dated August 7, 1964, service date August 13, 1964. Appendix D is the Order of Division 3, dated December 18, 1964, service date December 28, 1964. Appendix E is the order of the Interstate Commerce Commission, dated January 25, 1965, service

date February 1, 1965, and Appendix F is the underlying recommended report and order of Examiner David S. Letts, served December 12, 1963.

JURISDICTION.

This action was originally brought under the provisions of Secs. 204 (c) and 212 (a) of the Interstate Commerce Act, 49 U. S. C. 304 (c) and 312 (a), Sec. 10 of the Administrative Procedure Act, 5 U. S. C. 1009, and Secs. 1336, 1398, 2284 and 2321 to 2325, inclusive, of the Judicial Code, 28 U. S. C. 1336, 1398, 2284 and 2321 to 2325, inclusive, with the United States being named as party defendant pursuant to 28 U. S. C. 2322.

The jurisdiction of the Supreme Court to review by direct appeal is conferred by Secs. 1253 and 2101 (b) of the Judicial Code, 28 U. S. C. 1253 and 2101 (b).

The original action was brought for the purpose of annulling and setting aside the appended orders of the Interstate Commerce Commission.

The judgment of the District Court of Alabama in the action below was rendered May 21, 1965, and a timely notice of appeal from that decision was filed June 24, 1965.

The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case:

I. C. C. v. J-T Transport Company, 368 U. S. 81;
United States v. Drum, 368 U. S. 370; and
American Trucking Associations, Inc., et al. v. U. S., et al., 364 U. S. 1.

STATUTES INVOLVED.

In substance, two statutes are involved, that which authorizes judicial review, 5 U. S. C., Sec. 1009 (c), a portion of the Administrative Procedure Act, which provides:

"Scope of review—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions and determine the meaning or applicability of the terms of any agency action. It shall (a) compel agency action unlawfully withheld or unreasonably delayed; and (b) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of Secs. 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

In addition Sec. 5 of 49 U. S. C., particularly sub-sections (2) (a) and (b) which entrusts to the Interstate Commerce Commission the requirement of approving or disapproving of combinations or consolidations of carriers.

These sections are as follows:

"(2) (a). It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties, or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties

theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise, or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or . . ."

"(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or persons seeking authority therefor shall present an application to the Commission and thereupon the Commission shall notify the Governor of each state in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305 (e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction upon the terms and con-

ditions, and within the modifications, so found to be just and reasonable . . ."

QUESTIONS PRESENTED.

1.

May the Interstate Commerce Commission deviate from long established principles and apply instead radically different standards to similar situations?

2.

Is the statutory authority "to impose terms and conditions" equivalent to authority to expand and enlarge operating rights without notice and without supporting proof of public convenience and necessity?

STATEMENT OF THE CASE.

This case originates in an application filed jointly before the Interstate Commerce Commission (Commission) seeking the approval of the sale of operating rights represented by Certificate of Public Convenience and Necessity issued by the Commission to Edward Darby Lavender (Lavender) in Docket No. MC 108220 (Sub-No. 3).

In substance, this authority permits transportation service to be performed between Memphis, Tennessee, and specified Mississippi points, over specified routes, including Tennessee Highway 14-A and Mississippi Highway 301, together with U. S. Highway 61. It is regular route authority, providing basically service between Memphis and Nesbitt, Mississippi, a distance of approximately 20 miles.

If transferred, pursuant to the application, the authority would be joined or tacked with the irregular route authority of Deaton Truck Lines, Inc. (Deaton), the purchaser, to provide a single line service between such points as Birmingham, Alabama, and Atlanta, Georgia,

and Memphis, in direct and new competition with appellants and other motor carriers who appeared before the Commission as protestants.

The effect of the application, if ultimately granted, would be the purchase by Deaton of an access to Memphis for the transportation of general commodities, which authority it did not previously have but had undertaken to buy on two prior occasions without success.

These two efforts, which were rejected by the Commission, involve the attempted purchase by Deaton of similar rights of Capitol Freight Lines and Magnolia Truck Lines, Inc., each of which involved the purchase of very short operating rights between Memphis, Tennessee, and a small, nearby town in north Mississippi.

Deaton filed a joint application in concert with Lavender, before the Interstate Commerce Commission seeking Commission authority to transfer Lavender to Deaton the right to transport general commodities between Memphis, Tennessee, and Nesbitt, Mississippi.

In the resulting proceedings before the Commission, twelve certificated motor carriers, including the four appellants, appeared in protest. After a Commission decision which was administratively final, this action was brought before a Statutory Three-Judge U. S. District Court in Alabama to review the Commission's decision. From the adverse decision of that court, four plaintiffs bring this appeal based, as was the District Court case, upon the record made before the Commission.

BACKGROUND.

Edward Darby Lavender got the authority in question as a result of a hearing before the Commission in which the only public witness was the registered practitioner who represented Lavender and who, in the midst of the hearing, changed roles and became a witness representing a mattress company that never tendered a pound of

freight to Lavender for transportation under the authority thus granted.[1]

At that hearing, protests were withdrawn upon the acceptance of an amendment which prohibited operations over U. S. Highway 51, between Memphis, Tennessee, and Mississippi points and prescribed instead operations over the secondary roads, Tennessee Highway 14-A and Mississippi Highway 301.

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[1] MC-108220 (Sub No. 3), Transcript, Page 39:

"Mr. Taylor: I would like to take the stand as a witness.

"Mr. Clay: I would like to find out what basis he is going to testify.

"Mr. Taylor: Well let me stipulate. I am not an attorney now nor a practitioner, and I am not representing the applicant now.

"Mr. Phillips: You may take the stand.

"JOHN DENLY TAYLOR, SR.,
was duly sworn and testified as follows:

Direct Examination.

"The Witness: I am John Denly Taylor, Traffic Manager of The National Rose Spring and Mattress Company, of Memphis, Tennessee, and for what it might amount to just as a matter of record, I was the original owner of Lambert-Marks Express and sold it to Mr. Lavender, and that is where he got it. Does that clarify your situation?

"Mr. Clay: Do I take it that you intend to testify as a shipper witness in this proceeding?

"The Witness: Yes, sir.

"Mr. Clay: For the National Rose Spring and Mattress Company?

"The Witness: Yes, sir."

MC-108220 (Sub-No. 3), Transcript, Page 46:

"That is my testimony.

"Mr. Clay: I have no questions.

"Mr. Stevens: No questions.

"Mr. Phillips: Mr. Taylor, you may now be excused as a witness.

(Witness excused.)

"Mr. Taylor: I am now back as the representative of Mr. Lavender. I appreciate the Examiner and Chairman allowing me to testify in such a manner. I know it is unusual, but I have done it before. I know it is unethical and I do try to stay ethical."

When issued the authority directed the use of Tennessee Highway 14-A and Mississippi 301 coupled with U. S. Highway 61. The use of any other was therefore unauthorized and thus prohibited.

The authority designated as MC-108220 (Sub-No. 3) is that which Deaton seeks to purchase to enable it to join or tack that regular route authority with its own irregular route authority so that Deaton would be able to carry general commodity freight between Memphis and Birmingham and points east.

This is not an isolated transaction, but is the third of a series of such efforts, two of which have been repulsed by the Commission. The situation is best reflected by the chronology of events.

November 7, 1955, Deaton executed agreement to purchase Capitol for $28,000.

February 13, 1957, Commission denied authority for Deaton to purchase Capitol.

June 12, 1959, Sub No. 3 authority issued to Lavender.

August 3, 1959, Deaton and Lavender executed option for sale of Sub 3 authority, 52 days after its issuance and 39 days before any freight was transported thereunder.

September 11, 1959, first shipment transported under Lavender Sub 3 authority.

May 25, 1960, agreement executed for Deaton to purchase Magnolia.

November 22, 1961, Deaton's application to purchase Magnolia denied by Commission.

March 22, 1963, instant application for Deaton to purchase Lavender's Sub 3 authority filed.

August 13, 1964, Deaton purchase Lavender's Sub 3, initial approval.

December 28, 1964, petitions for reconsideration overruled.

QUESTIONS ARE SUBSTANTIAL.

Many years ago, the Interstate Commerce Commission chose to delineate authority it granted by distinguishing between regular routes and irregular routes and until recently such delineation rested on rational and rather well-defined grounds related to the transportation involved. Thus it evolved that the transportation of general commodities was performed over regular routes to particularly specified points for which a need had been demonstrated; the transportation of specified commodities, for example, heavy or cumbersome types or those requiring special equipment, was authorized over irregular routes because the nature of these shipments was such that they were not regularly shipped to particular points, but to those for which an individual demand or order had been singularly presented.

Regular routes evolved to be just that—the transportation of commodities over specified highways to specified points. Irregular routes, as distinguished, were granted to unspecified points within some specified territory—a number of states, a particular state, or some identifiable geographical area.

These constitute two distinct types of service heretofore usually held by the Commission to be mutually incompatible in the sense that joining the two, or tacking them, has the effect of destroying their necessary, distinguishing characteristics.

Here the Commission initially recognized its long standing criteria, when its examiner recommended approval of the sale of Lavender's rights to Deaton and the applicants asserted their ability and desire to maintain the distinction. However, when the matter of the joinder of the irregular with regular routes was called to the attention of the Commission, it chose under the guise of "Modification" to redescribe the rights to be transferred in terms of irregular routes which in effect amounted to a new

grant of enlarged authority as distinguished from authorizing the transfer of existing rights.

The "Modification" dictated by the Commission can hardly be recognized as such without doing violence to the word. The meaning of "modify" given in Webster's New International Dictionary, Second Edition, is "(1) to limit . . . (2) to reduce in extent or degree . . ."

The effect of the Commission's action is to limit by broadening, to reduce by enlarging, and actually to modify by transplanting.

Operating authority, originally granted after the acceptance of an amendment which prohibited operations over U. S. Highway 51, and prescribed operations over specific secondary roads is thus "modified", without prior notice to any party, so as to open wide the gate of authority and thus permit unlimited and unrestricted operations over Highway 51, theretofore not authorized. This has been done by administrative fiat, without so much as a passing glance at statutory requirements of notice, hearing, evidentiary support or proof of public convenience and necessity.

Such constitutes a radical and, in this instance, completely unexplained departure from previous practices of the Commission consistently followed.

Thus, the Commission, without reason, abandoned its rule, rooted in statute, that new rights are not granted without an application sustained by proof of public convenience and necessity.

In authorizing the transfer, the Commission chose again to abandon, also without reason, its rule against the transfer of dormant rights. This, we assert in full awareness of the statement of the District Court of Alabama at 241 F. Supp., page 295:

> "It is clear that Lavender's certificate was not dormant."

With all deference to that Court, we must and do assert, not only that the Commission ignored the evidence in this respect, but that the District Court did not, because it could not, point to any evidence to sustain this statement.

As demonstrated by the chronology of events, the option to purchase was in existence prior to the transportation of a single shipment of a single pound of freight over the specified route of Lavender's Sub-No. 3 certificate.

As the Commission found, the interchanged freight, almost entirely carried for freight forwarders, could not, and thus did not, move over the authorized routes.

Significantly, the Commission found (Division 3, Decision and Order, dated August 7, and served August 13, 1964; Appendix C, Sheet 2) "that all traffic interchanged at Nesbitt is transported by vendor (Lavender) over U. S. Highway 51 to or from Memphis, Tennessee . . ."

This movement was specifically prohibited under the subject certificate.

We repeat, again with deference, but with confirmed conviction, where no traffic moves over certificated routes in the manner thereby authorized, such rights are dormant. Lavender's Sub-No. 3 certificate was dormant. As such, it was not susceptible of transfer, without a radical departure from the long established practice of the Commission.[2]

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[2] "Following a long line of prior decisions, the transfer of dormant authority in the absence of a showing of a public need for the resumption of service thereunder, which has not been done in the instant proceeding, would not be consistent with the public interest. *Transcon Lines—Purchase—Anderson*, 7 F. C. C. 31,532, 50 M. C. C. 749, *Kings Van & Storage, Inc.—Purchase—Millard, supra*, 13 F. C. C. 34,436, 75 M. C. C. 582, 14 F. C. C. 34,811, 85 M. C. C. 110, and *C. I. Whitten Transfer Co.—Purchase—Leishman, supra*, 75 M. C. C. 562." *Coastal Tank Lines, Inc.—Purchase (Portion)—William J. Lobb, Inc.*, No. MC-F-7177, 14 F. C. C. 40,296.

CONCLUSION.

This resume of pivotal points might evoke the question, "What is substantial about the transfer of 20 miles of operating rights?" Narrowly considered, in a vacuum, the distance is unsubstantial. The substance draped on this short mileage framework arises not from the distance but from principles. These principles undergird and support motor carrier operations which have hitherto provided guidelines by which motor carriers (and the lawyers giving them advice) have been governed.

Such a departure as here presented from these principles by unbridled administrative fiat inevitably must have a devastating far reaching effect upon motor carriers as a whole, and particularly the appellants who are immediately affected. They are faced with dilution of traffic, dimunition of revenue, destruction of the value of their investments made in reliance upon the reasonably anticipated protection of their operating rights from unlawful encroachment.

These questions are substantial, and by their nature require plenary consideration for their resolution upon briefs and oral argument in this Court.

Respectfully submitted,

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APPENDIX A.

Before **Gewin**, Circuit Judge, and **Lynne** and **Grooms**, District Judges.

Lynne, District Judge.

Proceeding under 28 U. S. C. A. §§ 1336, 1398, 2284, and 2321-2325 and 5 U. S. C. A. § 1009, plaintiffs, six common carriers by motor vehicle, brought this action against the Interstate Commerce Commission (Commission) and the United States[1] to set aside an order of the Commission, which became administratively final on January 25, 1965, approving the joint application of Deaton Truck Line, Inc. (Deaton) and Edward Darby Lavender, an individual doing business as Lambert-Marks Express (Lavender) seeking authority under Section 5 of the Interstate Commerce Act (Act) for the purchase by Deaton of a portion of the certificated operating rights of Lavendar.

Deaton operates as a motor common carrier of general commodities over irregular routes between Atlanta, Georgia, on the one hand, and Talladega, Alabama, on the other, and between Birmingham, Alabama, and points within 65 miles thereof (including Talladega), on the one hand, and New Orleans, Louisiana, and points in Mississippi, on the other. By tacking these two authorities at Talladega, Deaton can operate between Atlanta, Georgia, and points in Mississippi. Deaton also holds authority to transport numerous specific commodities from, to and between points in several southeastern states and Memphis, Tennessee, where it maintains terminal facilities.

Lavender holds three certificates of public convenience and necessity to operate as a motor common carrier of general commodities over regular routes, insofar as per-

[1] Deaton Truck Line, Inc. was permitted to intervene as a defendant under the authority of 28 U. S. C. A., § 2323 and Rule 4, Fed. R. Civ. P.

tinent here, between Memphis, Tennessee, and Savage, Mississippi, over U. S. Highway 61, Tennessee Highway 14A and Mississippi Highway 301, serving the intermediate and off-route points of Eudora and Arkabutla, Mississippi, and the off-route points of Banks, Prichard and Nesbitt, Mississippi.

Deaton sought authority to buy, and Lavender to sell, the operating authority between Memphis and Savage. Acquisition of this authority would permit Deaton, by tacking to its existing authorities, to transport general commodities in single-line service between Memphis and Atlanta and between Memphis and the Birmingham area, in competition with the twelve motor carriers who appeared as protestants in the proceedings before the Commission, six of whom are plaintiffs here.

Since the latter part of 1959 in order to gain entry into Memphis, an important gateway for general commodity shipments, Deaton interlined with Lavender at Nesbitt, Mississippi. With this joint-line service Lavender utilized his own tractors and drivers between Memphis and Nesbitt and such interlined shipments moved over U. S. Highway 51.

This severe capsulation of the underlying facts serves as a backdrop for the restricted contentions of counsel for plaintiffs in oral argument, to which we now turn and respond.

1. It is insisted that the failure of the Commission to follow, distinguish or discuss two prior proceedings involving applications of Deaton to purchase operating rights of other carriers to gain single-line, general commodity access to Memphis[2] resulted in findings and conclusions which were arbitrary and capricious and constituted an abuse of discretion within the contemplation of

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[2] Deaton Truck Line, Inc.—Purchase (Portion)—Capitol Freight Lines, Inc., 70 M. C. C. 365, Deaton Truck Line, Inc.—Purchase (Portion)—Magnolia Truck Line, Inc., Docket MC-F-7608.

the Administrative Procedure Act, 5 U. S. C. A. § 1009 (e).[3]

[1, 2] To discuss the dissimilarities between the records in Capitol and Magnolia and the record of the proceedings now under review in search of a distinction would unduly extend this opinion. It is neither the duty nor the right of this court "... to enquire into the soundness of the Commission's reasoning, the wisdom of its decisions, **or the consistency of its conclusion with those reached in similar cases.**" (Emphasis supplied, Georgia Public Service Commission v. United States, 283 U. S. 765, 775, 51 S. Ct. 619, 623; 75 L. Ed. 1397 (1931).)[4]

2. It is insisted that by according controlling weight to prior interline activities of vendor and vendee the Commission was guilty of arbitrary action.

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[3] § 1009 *Judicial review of agency action*:

"Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

"(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

[4] The following quotation is lifted from the opinion in Anderson Motor Service v. United States, 151 F. Supp. 577 (E. D. Mo. 1957):

"The courts have many times held that the findings of the Commission may not be attacke i because they are inconsistent with findings made in other cases. Citations omitted.)"

[3, 4] As this court observed in American Trucking Ass'ns v. United States, 101 F. Supp. 710, 726 (N. D. Ala. 1951): "It is the task of the Commission and not of the courts to pass upon the weight and credibility of the evidence."[5]

3. It is next insisted that approval by the Commission of the instant transaction which would result in a completely new service, radically different from any contemplated in the original grants of authority, without any evidence of or finding as to public convenience and necessity was arbitrary and capricious.

[5] In reviewing an order of the Commission authorizing the consolidation of several motor carriers under Section 5 (2) of the Act, the Supreme Court in McLean Trucking Co. v. United States, 321 U. S. 67, 87, 64 S. Ct. 370, 381, 88 L. Ed. 544 (1944) observed: "If the Commission did not exceed the statutory limits within which Con-

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[5] Plaintiffs' criticism of the manner in which the Commission weighed the evidence in these proceedings is fully answered by the following from Virginia Stage Lines v. United States, 48 F. Supp. 79, 83 (W. D. Va. 1942):

"The function of 'weighing' the evidence, therefore, remains peculiarly one for the Commission 'appointed by law and informed by experience', and not for the courts. (Citations omitted.) This is in accord with the realization that the regulation of transportation involves various economic factors and the exercise of an empirical judgment, since 'The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems.' (Citation omitted.)"

Accord: Merchants Warehouse Co. v. United States, 283 U. S. 501, 51 S. Ct. 505, 75 L. Ed. 1227; Loving v. United States, D. C., 32 F. Supp. 464, affirmed 310 U. S. 609, 60 S. Ct. 898, 84 L. Ed. 1387; United States v. Carolina Freight Carriers Corp., 315 U. S. 475, 62 S. Ct. 722, 86 L. Ed. 971; Lang Transportation Co. v. United States, D. C., 75 F. Supp. 915; Hanna Furnace Corp. v. United States, D. C., 53 F. Supp. 341, affirmed *per curiam* 323 U. S. 667, 65 S. Ct. 41, 89 L. Ed. 543.

gress confined its discretion and its findings are adequate and supported by evidence, it is not our function to upset its order." Contrary to the views which plaintiffs urge upon this court, the Commission expressly found that a new service would not emerge from Deaton's acquisition of Lavender's authority.[6]

[6] This dispositive finding of fact is supported by substantial evidence in the record.[7]

4. It was further insisted that in converting the regular-route authority being purchased into irregular-route authority without notice to Deaton's competitors who will obviously be affected thereby and without a showing that such action is warranted in the public interest, the Commission acted arbitrarily and capriciously.

[7] This contention stems from the Commission's requirement of a modification of vendor's certificate, as a condition precedent to the consummation of the transaction, by re-describing Lavender's authority in irregular-

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[6] In his report and order the hearing examiner found, and such finding was adopted by the Commission:

"It is clear from the evidence that vendor has performed transportation under his rights continuously and to a degree commensurate with his abilities and the demands for his services. Moreover, vendor and vendee have interchanged a substantial amount of traffic at Nesbitt, and it is well established that where such interchange has occurred in the past, the single-line service which would result from unification of the rights would not be a wholly new service. See Transcon Lines—Purchase—B&M Exp., Inc., 75 M. C. C. 693; Jones—Control & Merger—Clifford, 85 M. C. C. 603." No. MC-F-8395, Sheet 11 of Examiner's Report.

[7] In Campus Travel, Inc. v. United States, 224 F. Supp. 146 (S. D. N. Y. 1963), the court stated:

". . . 'substantial evidence' may well support two conflicting points of view. If we were to say that only one position in any given case could be supported by 'substantial evidence', we would be depriving the Commission of the discretion afforded to it by law, and we would, in effect, be reviewing its determinations to see if the 'correct' result had been reached. This we cannot and will not do."

route terms. The source of its power to do so is to be found in the statute. 49 U. S. C. A. § 5 (2) (b).[8]

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[8] Section 5 (2) (a) (i), 5 (2) (b), and 5 (2) (c), 49 U. S. C. A. provide, in pertinent part, respectively as follows:

Section 5 (2) "(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b) of this paragraph—

"(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

* * * * * * *

"(b) Whenever a transaction is proposed under subdivision (a) of this paragraph, the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each state in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 305 (e) of this title), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subdivision (a) of this paragraph and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: * * *

"(c) In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect

[8, 9] As the Supreme Court has pointed out, at the time of approval of a section 5 (2) application, the Commission has the power to impose any condition on the certificate to be issued to the vendee which the "Commission reasonably deems . . . useful in protecting competition, or for other statutory purposes . . ." United States v. Rock Island Company, 340 U. S. 419, 431, 71 S. Ct. 382, 389, 95 L. Ed. 391 (1951). Undeniably, the Commission has authority to classify common carrier service as regular and irregular route, and these distinctions are appropriate and recognized under well settled principles of transportation law.[9]

[10] 5. Cogently advanced in brief and on oral argument is plaintiff's contention that, by failing to note that this transaction is a classic example of trafficking in operating rights, which it has in the past refused to approve and condone, the Commission's action was arbitrary and capricious.

It is clear that Lavender's certificate was not dormant. There is no evidence in the record that Deaton influenced Lavender's acquisition of such certificate or his decision to grant an option to Deaton for its purchase. We are persuaded that no legitimate inference may be drawn from the evidence in this record that the existence of such option in some manner tainted the interline operations of Deaton and Lavender.[10]

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of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected."

[9] United States v. Maher, 207 U. S. 148, 59 S. Ct. 768, 83 L. Ed. 1162 (1939); United States v. Carolina Carriers Corp., 315 U. S. 475, 62 S. Ct. 722, 86 L. Ed. 971 (1942).

[10] In rejecting the various contentions of protestants that it was being requested to sanction the acquisition by Deaton of a certifi-

6. Finally, it is urged that the refusal of the Commission to restrict the operating rights to be acquired by Deaton to preclude transportation operations between Nesbitt, Mississippi, and Memphis, Tennessee, over U. S. Highway 51, in view of the fact that such operations were unauthorized under Lavender's Sub-No. 3 certificate, was arbitrary and capricious.

[11] The short answer to this contention is that the Commission found that such operations were in fact authorized.[11] Here we have an interpretation placed by the

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cate held by Lavender merely for the purpose of speculative barter and sale, the Commission had before it evidence that the certificate in question was issued to Lavender June 12, 1959; that such certificate did not authorize Lavender to serve Hernando, Mississippi, the point in which he was primarily interested; that although Lavender has always intended to operate, and has operated under the authority of his certificate to the extent traffic has been available, he quickly concluded that he could not conduct a profitable operation thereunder and on August 3, 1959, he granted Deaton an option to purchase such certificate; that such option did not threaten the independent existence of Lavender, but, to the contrary, it assured continuation of interline service with Deaton resulting in movement of substantial traffic to the mutual benefit of the participating carriers and the shipping public, and that Deaton had nothing to do with Lavender's acquisition of such certificate nor his decision to offer it for sale to Deaton.

[11] The Commission specifically ruled on this argument as follows:

"*It further appearing,* That the interchange of traffic at authorized off-route points is lawful (Compare National Transp. Co.—Purchase—North Bradford Transp., 65 M. C. C. 545, 70 M. C. C. 55), and that substantially all of the non-local traffic moving under the considered regular-route authority has been interchanged at Nesbitt, Miss., an authorized off-route point adjacent to but not on U. S. Highway 51;

"*It further appearing,* That all traffic interchanged at Nesbitt is transported by vendor over U. S. Highway 51 to or from Memphis, Tenn., a terminal point on the considered regular route, that operations over the shortest possible highways between Nesbitt and the considered regular route would require the use of line haul equipment in whole or in substantial part over one of two secondary roads, the shortest of which is partially unpaved and the other requiring an operation not significantly shorter than vendor's operation over U. S. Highway 51 between Nesbitt and Memphis, that

Commission upon a certificate of its own creation. On this record we are bound by that interpretation.[12]

Having canvassed the "whole record" in obedience to the command of the Administrative Procedure Act[13] we are of the opinion that the order of the Commission rests upon adequate findings[14] supported by substantial evidence.

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in the circumstances presented the shortest practicable highway between Nesbitt and the considered regular route is U. S. Highway 51, and that vendor has performed lawful, off-route service in accord with National Transp. Co.—Purchase—North Bradford Transp., supra, and Ferguson Frt. Lines, Inc., Modification of Certificate, 53 M. C. C. 91, 61 M. C. C. 87, 62 M. C. C. 261." (Sheet 2, Commission Order, appendix II to Complaint.)

[12] As this court had occasion to point out in Malone Freight Lines v. United States, 107 F. Supp. 946 (N. D. Ala. 1952), "The scope of our review is necessarily confined to the interpretation placed by the Commission upon a certificate of its own creation. We are bound by that interpretation unless we are persuaded that it was capricious or arbitrary, that it constituted an abuse of discretion, or that it did violence to some established principle of law. It is beyond our province to consider 'the soundness of the reasoning by which its conclusions were reached' ". (Footnote omitted.)

[13] 5 U. S. C. A., § 1001, *et seq.*

[14] We adopt the clear opinion of the court in M. & M. Transportation Co. v. United States, 128 F. Supp. 296 (D. Mass. 1955):

"The courts have continually asserted that the discretion of the Commission in a § 5 proceeding is sweeping Congress intending that the Commission exercise its expert knowledge in assuring consistency with the public interest, and the exercise of this discretion will not be disturbed if the Commission's findings are adequate in view of the statutory requirements. (Citations omitted.)

* * * * * * *

"The nature of the required basic findings is in part stated, in part suggested, by the statute. Section 5 (2) (c) prescribes that the Commission should give weight to, among other considerations, '(1) The effect of the proposed transaction upon adequate transportation service to the public; . . . (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.' And by requiring ultimate findings of 'public advantage' or 'public convenience and necessity' to support similar transactions, Congress by implication has indicated that these findings need not be made in an acquisition proceeding involving only motor carriers. The Supreme Court has several times mentioned other factors which should be reflected in the Com-

The order of the Commission is affirmed. An appropriate judgment will be prepared and entered dismissing the complaint with prejudice.

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mission's basic findings in a § 5 proceeding. New York Central Securities Corp. v. United States, 1932, 287 U. S. 12, 23, 25, 53 S. Ct. 45, 47, 48, 77 L. Ed. 138 ('economy and efficiency in operation'; 'adequacy of transportation service'); McLean Trucking Co. v. United States, 1944, 321 U. S. 67, 86-88, 64 S. Ct. 370, 88 L. Ed. 544 (improving adequacy of service, but Commission need not find that existing service is inadequate; Commission should consider diminution of competition)."

With respect to the adequacy of findings of fact by the Commission generally this court observed in American Trucking Associations v. United States, 101 F. Supp. 710 (N. D. Ala. 1951), at page 724: "The courts have never exacted of it a legalistic formalism in such findings but have recognized that they may be 'interwoven' with its discussion of the evidence, relating it to the contentions of the parties and its own ultimate conclusions. (Footnote 26 omitted.)"

APPENDIX B.

In conformity with the opinion of the court contemporaneously entered herewith:

It is **Ordered, Adjudged** and **Decreed** by the court that plaintiffs are not entitled to the relief for which they pray and that this action be and the same is hereby dismissed with prejudice; and, that the costs of court incurred herein be and the same are hereby taxed against plaintiffs.

Done, this the 21st day of May, 1965.

/s/ Walter P. Gewin,
Circuit Judge,

/s/ Seybourn H. Lynne,
District Judge,

/s/ H. H. Groom,
District Judge.

APPENDIX C.

Service Date
August 13, 1964

Decision and Order.

At a Session of the Interstate Commerce Commission, Division 3, held at its office in Washington, D. C., on the 7th day of August, A. D. 1964.

No. MC-F-8395

Deaton Truck Line, Inc.—Purchase (Portion)—Edward Darby Lavender

Upon consideration of the application under section 5, the record in the above-entitled proceeding, the report and recommended order of the examiner served December 12, 1963, the exceptions thereto filed by protestants Bowman Transportation, Inc., Malone Freight Lines, Inc., Eagle Motor Lines, Inc., Alabama Highway Express, Inc., Transcon Lines, Hoover Motor Express Co., Ryder Truck Lines of Tennessee, Inc., Southern Trucking Corporation, Gordon's Transports, Inc., Baggett Transportation Company, Campbell Sixty-Six Express, Inc., and Jack Cole Company, the reply of applicants to said exceptions, the petition filed February 18, 1964, by Deaton, Inc., and E. N. Conaway to supplement and amend the application, the motion filed May 22, 1964, by Malone Freight Lines, Inc., Eagle Motor Lines, Inc., Bowman Transportation, Inc., and Alabama Highway Express, Inc., to strike said petition, the request filed May 28, 1964, by Transcon Lines to be joined in said motion to strike, and the reply of Deaton Truck Line, Inc., to said motion to strike; and

It appearing, That subsequent to the hearing, and service of the examiner's report and recommended order, all of the outstanding capital stock of Deaton Truck Line, the holding company owning all of the capital stock of

Deaton Truck Line, Inc., was sold to Deaton, Inc., a non-carrier corporation organized under the laws of the State of Alabama; that on January 21, 1964, Deaton Truck Line was merged into Deaton, Inc., and the corporate existence of Deaton Truck Line terminated; and E. N. Conaway, of Jefferson County, Ala., controls Deaton, Inc., through ownership of 90 percent of its outstanding capital stock;

It further appearing, That neither the sale of the capital stock of Deaton Truck Line, the holding company, to Deaton, Inc., or the merger of the former into the latter, constituted a transaction subject to the jurisdiction of this Commission; that neither the record herein, nor the motion to strike the petition to supplement the record and amend the application, set forth any facts or circumstances which would preclude Deaton, Inc., and, in turn, E. N. Conaway, from acquiring control of Deaton Truck Line, Inc.; that the motion to strike said petition should be denied; and that the petition to supplement and amend the record should be granted;

It further appearing, That the primary investment of Deaton, Inc., is in Deaton Truck Line, Inc.; and that Deaton, Inc., should, under the provisions of section 5 (3) of the Interstate Commerce Act, be considered a carrier and be subjected to the provisions of sections 204 (a) (1) and (2), 214, and 220 of the act;

It further appearing, That between September 11, 1959, and June 11, 1963, vendor transported a total of 87 so-called local shipments destined to points not including Memphis on or appurtenant to the considered regular route, that said points total six in number and none has a probable population in excess of 200, and that such points are served by vendor to the extent that traffic is available;

It further appearing, That the interchange of traffic at authorized off-route points is lawful (Compare **National**

Transp. Co.—Purchase—North Bradford Transp., 65 M. C. C. 545, 70 M. C. C. 55), and that substantially all of the non-local traffic moving under the considered regular-route authority has been interchanged at Nesbitt, Miss., an authorized off-route point adjacent to but not on U. S. Highway 51;

It further appearing, That all traffic interchanged at Nesbitt is transported by vendor over U. S. Highway 51 to or from Memphis, Tenn., a terminal point on the considered regular route, that operations over the shortest possible highways between Nesbitt and the considered regular route would require the use of line haul equipment in whole or in substantial part over one of two secondary roads, the shortest of which is partially unpaved and the other requiring an operation not significantly shorter than vendor's operation over U. S. Highway 51 between Nesbitt and Memphis, that in the circumstances presented the shortest practicable highway between Nesbitt and the considered regular route is U. S. Highway 51, and that vendor has performed lawful, off-route service in accord with **National Transp. Co.—Purchase—North Bradford Transp.**, *supra*, and **Ferguson Frt. Lines, Inc., Modification of Certificate**, 53 M. C. C. 91, 61 M. C. C. 87, 62 M. C. C. 261;

It further appearing, That the considered regular route does not lend itself to regularly scheduled service but rather to a call-on-demand truckload type of service, that although the quantity of the service conducted by vendor has been lawful and in accord with the decisions in **Wooten—Purchase—Columbia Truck Exp.**, 49 M. C. C. 586, and **Motor Common Carriers of Property—Routes and Service**, 88 M. C. C. 435, the transfer and continued description of the considered authority in regular-route terms is not shown to be in the public interest, and that the considered authority should be redescribed as an incident of approval of this transaction;

It further appearing, That the findings and conclusions of the hearing examiner should be amended as follows:

(1) by eliminating the paragraph beginning on line 13 of sheet 2 of his report, and substituting in lieu thereof a new paragraph reading:

> Vendee, an Alabama corporation, is controlled by Deaton, Inc., a holding company, which owns all of its outstanding common capital stock, and the holding company stock, in turn, is owned 67½ shares, or 90 percent, by E. N. Conaway, and 7½ shares, or 10 percent, by Claude N. Knox.

(2) By eliminating the paragraph beginning on line 38 of sheet 5,

(3) By eliminating the paragraph beginning on line 7 of sheet 12, and substituting in lieu thereof a new paragraph reading:

> The purchase by Deaton Truck Line, Inc., of a portion of the operating rights of Edward Darby Lavender, doing business as Lambert-Marks Express, and the acquisition by Deaton, Inc., and, in turn, by E. N. Conaway, of control of such rights through the purchase, upon the terms and conditions previously set forth herein, which terms and conditions are found to be just and reasonable, constitute a transaction within the scope of section 5 (2) (a) and will be consistent with the public interest, and that, if the transaction is consummated, Deaton Truck Line, Inc., will be entitled to operate under the rights granted in No. MC-108220 (Sub No. 3), which rights are herein authorized to be unified with rights otherwise confirmed in it and to be embraced in a certificate to be issued in its name, with duplications eliminated, **provided, however**, that, if the authority granted herein is exercised, the operating rights to be ac-

quired shall be redescribed in irregular-route terms so as to authorize service between Memphis, Tenn., on the one hand, and, on the other, Arkabutla, Banks, Eudora, Nesbitt, Prichard and Savage, Miss.

(4) By eliminating the paragraph beginning on line 33 of sheet 12, and substituting in lieu thereof a new paragraph reading:

> The purchase by Deaton Truck Line, Inc., of Birmingham, Ala., of a portion of the operating rights of Edward Darby Lavender, doing business as Lambert-Marks Express, of Marks, Miss., and the acquisition by Deaton, Inc., of Jefferson County, Ala., and, in turn, by E. N. Conaway, also of Jefferson County, Ala., of control of the operating rights through the purchase be, and they are hereby, approved and authorized, subject to the terms and conditions herein set forth.

And (5) by eliminating the words "Deaton Truck Line" appearing in lines 11 and 12 on sheet 13, and substituting, in lieu thereof, the words "Deaton, Inc.".

And it further appearing, That except as dealt with herein the exceptions of the protestants raise no new or material issues or matters of fact or law not adequately considered and properly disposed of by the hearing examiner in his report; and that the exceptions and reply otherwise are not of such nature as to require the issuance by Division 3 of a report discussing the evidence in the light of such pleadings:

Wherefore, and good cause appearing therefor:

We find, That the evidence, considered in the light of the exceptions, the reply thereto, the petition to supplement and amend the record, and the motion to strike said petition, does not warrant a different result from

that reached by the hearing examiner; that the statement of facts, the conclusions and the findings of the hearing examiner, as herein modified and amended, being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as our own; and

It is ordered, That the petition of Deaton, Inc., and E. N. Conaway, filed February 18, 1964, to supplement and amend the application so as to show Deaton, Inc., and, in turn, E. N. Conaway as the parties in control of Deaton Truck Line, Inc., be, and it is hereby, granted; and that the motion to strike said petition be, and it is hereby, denied;

It is further ordered, That if the transaction herein authorized is consummated, Deaton, Inc., shall thereafter be considered as a motor carrier subject to the provisions of sections 204 (a) (1) and (2), 214, and 220 of Part II of the Interstate Commerce Act;

And it is further ordered, That the order of the hearing examiner, served December 12, 1963, as herein modified, be, and it is hereby, adopted as the order of the Commission, Division 3, effective 35 days from the date of service hereof.

By the Commission, Division 3.

Harold D. McCoy,
Secretary.

(Seal)

APPENDIX D.

Service Date
December 28, 1964.

Order.

At a Session of the **Interstate Commerce Commission**, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 18th day of December, A. D. 1964.

No. MC-F-8395

Deaton Truck Line, Inc.—Purchase (Portion)—Edward Darby Lavender.

Upon consideration of the record in the above-entitled proceedings; of joint petitions of protestants, (1) Gordons Transports, Inc., Baggett Transportation Company, and Campbell Sixty-Six Express, Inc., filed September 24, 1964, (2) Hoover Motor Express Co., Inc., and Ryder Truck Lines of Tennessee, Inc., filed September 28, 1964; and (3) Malone Freight Lines, Inc., Bowman Transportation, Inc., Eagle Motor Lines, Inc., Alabama Highway Express, Inc., and Transcon Lines, Inc., filed September 29, 1964, for reconsideration of the decision and order of the Commission, Division 3, entered August 7, 1964; and the reply of applicants, filed October 12, 1964:

It appearing, That the petitions set forth no material facts in addition to those discussed in the decision and order of the Division or arguments of any substance which were not considered by the Division, that no error has been established with respect to the said decision, and that reconsideration is not warranted:

It is ordered, That the said petition be, and it is hereby, denied and the order of August 7, 1964, shall be effective 20 days from the date this order is served.

By the Commission, Division 3, acting as an Appellate Division.

Harold D. McCoy,
Secretary.

(Seal)

APPENDIX E.

Service Date
February 1, 1965.

Order.

At a General Session of the **Interstate Commerce Commission**, held at its office in Washington, D. C., on the 25th day of January, A. D. 1965.

No. MC-F-8395

**Deaton Truck Line, Inc.—Purchase (Portion)—
Edward Darby Lavender**

Upon consideration of the record in the above-entitled proceeding, including the petitions of (1) Gordons Transports, Inc., Baggett Transportation Company, and Campbell Sixty-Six Express, and (2) Malone Freight Lines, Eagle Motor Lines, Inc., Bowman Transportation, Inc., and Alabama Highway Express, Inc., both filed January 11, 1965, under the provisions of Section 1.101 (a) (4) of the General Rules of Practice before the Commission for a finding that this proceeding involves issues of general transportation importance; and

It appearing, That an issue of general transportation importance has not been presented:

It is ordered, That the said petitions be, and they are hereby, denied, and the order of August 7, 1964, shall be effective 20 days from the date this order is served.

By the Commission.

Bertha F. Armes,
Acting Secretary.

(Seal)

APPENDIX F.

Interstate Commerce Commission.

Served December 12, 1963.

Notice to the Parties

Exceptions, if any, must be filed with the Secretary, **Interstate Commerce Commission**, Washington, D. C., and served on all parties in interest within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of such exceptions. At the expiration of said period for the filing of exceptions, the recommended order will become the order of the Commission and will become effective unless exceptions have been seasonably filed or the order has been stayed or postponed by the Commission. If exceptions are filed, replies to exceptions may be filed within 20 days after the final date for filing of exceptions. It should not be assumed that the recommended order has become effective as the order of the Commission until a notice or order to that effect, has been served.

No. MC-F-8395.

Deaton Truck Lines, Inc.—Purchase (Portion)—Edward Darby Lavender

Decided .....

Purchase by Deaton Truck Lines, Inc., of a portion of the operating rights of Edward Darby Lavender, an individual, doing business as Lambert-Marks Express, and for acquisition by Deaton Truck Line, a corporation, and in turn by the executors of the estate of Edwin M. Sellers, deceased, and Dorothy S. Sel-

lers, of control of the rights through the purchase, approved and authorized, subject to conditions.

A. Alvis Layne, and **Edward G. Grogan**, for applicants.

Maurice F. Bishop, Louis I. Dailey, John W. Cooper, Charles H. Hudson, Jr., Herbert J. Johnson, and **Frank W. Taylor, Jr.**, for protestants.

Report and Order.

Recommended by David S. Letts, Hearing Examiner.

Deaton Truck Line, Inc. (Deaton), of Birmingham, Ala.; and Edward Darby Lavender, an individual, doing business as Lambert-Marks Express (Lavender), of Marks, Miss., by a joint application filed March 22, 1963, as amended, seek authority under section 5 of the Interstate Commerce Act for the purchase by the former of a portion of the operating rights of the latter for $10,000. Deaton Truck Line, a corporation, of Livingston, Ala., and in turn, the executors of the estate of Edwin M. Sellers, deceased, and Dorothy S. Sellers, who control Deaton Truck Line, Inc., through stock ownership, seek authority under the same section to acquire control of the operating rights through the purchase. A hearing has been held at which the application was opposed by 12 motor carriers[1], of whom 11 presented evidence. Vendee operates more than 20 motor vehicles in transportation subject to part II of the Act.

Vendee, an Alabama corporation, is controlled by Deaton Truck Line, a holding company, which owns a majority of its outstanding common capital stock, and the

[1] Malone Freight Lines, Inc. (Malone), Eagle Motor Lines (Eagle), Bowman Transportation, Inc. (Bowman), Alabama Highway Express, Inc. (Alabama Express), Gordons Transports, Inc. (Gordons), Campbell Sixty-Six Express, Inc. (Campbell), Baggett Transportation Company (Baggett), Jack Cole Company (Cole), Hoover Motor Express Co., Inc. (Hoover), Ryder Truck Line of Tennessee, Inc. (Ryder), Southern Trucking Corporation (Southern), and Transcon Lines (Transcon).

holding company stock in turn is owned by the estate of Edwin M. Sellers, deceased, and Dorothy S. Sellers. Edwin M. Sellers' stock is currently under the control of his executors, and under the terms of his will, Dorothy S. Sellers may elect to receive all of his shares in the holding company.

As here pertinent, vendee operates pursuant to certificates issued in No. MC-11207, and Sub-Nos., as a motor common carrier of general commodities, with exceptions, over irregular routes, between Atlanta, Ga., on the one hand, and, on the other, Talladega, Ala.; between Birmingham and points within 65 miles thereof, on the one hand, and, on the other, New Orleans, La., and points in Mississippi; and a number of specified commodities from, to, and between points in several southeastern states, including certain commodities to or from Memphis.

Vendor operates as a motor common carrier pursuant to certificates issued in No. MC-108220, and Sub-Nos. 2 and 3 thereunder, over regular routes, of general commodities, except those of unusual value, class A and B explosives, household goods as defined by the Commission, commodities in bulk, and those requiring special equipment between Memphis, Tenn., and Lambert, Miss., over U. S. Highway 51, serving no intermediate points north of Como, Miss., between Como and the junction of Mississippi Highway 6 and U. S. Highway 61; between Lambert, Miss., and Vance, Miss.; and as proposed to be transferred herein, under the Sub-No. 3, between Memphis, Tenn., and Savage, Miss., over U. S. Highway 61, Tennessee Highway 14-A and Mississippi Highway 301, serving the intermediate points of Eudora and Arkabulta, Miss., and the off-route points of Banks, Prichard, and Nesbitt, Miss.

Under an agreement of January 7, 1963, vendee would purchase from vendor his rights described in No. MC-

108220, Sub-No. 3, for the sum of $10,000, payable within 30 days after notice of approval by the Commission, either in cash or in such installments as he shall request.

Vendee's balance sheet as of May 31, 1963, shows assets aggregating $2,958,267, consisting of: current assets $843,187, including cash $177,946, working funds $2,581, accounts receivable $623,971, prepayments $26,709, and material and supplies $11,980; carrier operating property, less reserves, $1,865,772; intangibles, less reserve for amortization $2,049; investments $18,586; deferred debits $205,404; deposits $12,251; and other $11,018. Its liabilities were: current liabilities $283,327, composed of accounts payable $159,130, interline payable $11,619, accrued wages and taxes $25,572, deposits $81,995, and other $5,012; long-term obligations, due within one year $495,128, due after one year $1,442,745; and other deferred liabilities $6,581; deferred credits, conditional sales 1958-1962, $25,441; reserves and insurance, deficit $20,567; capital stock $141,600; and earned surplus $584,012.

Vendee's income statements for the years 1961, 1962, and the first five months of 1963, show revenues of $5,009,253, $5,951,597, and $2,110,043, net income, before taxes, $182,202, $193,574, and deficit $1,234, and after such provision $174,246, $139,077, respectively.

Vendor's balance sheet as of June 1, 1963, shows assets aggregating $41,003, consisting of cash $3,420, accounts receivable $1,740, home and warehouse, $15,000, book value of truck and equipment $19,535, and prepaid taxes $1,250. His liabilities were, equipment obligations $3,525, and net worth $37,478.

Vendor's income statements for 1961, 1962, and the first five months of 1963, show revenues of $8,702, $102,457, and $40,175, and net income, after taxes, of $23,949, $26,074, and $13,765, respectively.

Vendor has been engaged in motor carrier activities since 1948. He was granted the Sub-No. 3 authority proposed to be sold herein, on June 12, 1959, and on August 1, 1959, gave Deaton an option to purchase the rights and the instant purchase agreement resulted therefrom. The great bulk of traffic moving under the rights consists of shipments interlined with Deaton at Nesbitt. In this joint-like service, vendor utilizes his own tractors and drivers between Memphis and Nesbitt and his drivers accept and inspect the interchanged equipment. Although vendor has transported a small amount of local freight under the Sub-3 rights, the operation would not be profitable without revenues received from interchanged traffic. He has concluded that he should sell the involved rights and accordingly entered into the instant transaction. The evidence shows that from July through December 1962, vendor conducted continuous and substantial operations under the Sub-3 authority. An abstract of shipments transported the first seven days of each month during that period shows 300 shipments almost all of which were interlined with vendee at Nesbitt. The commodities transported included cement, asbestos pipe, asphalt siding, bridge metalwork, roofing, tire tread, electric cable, furniture, sales tickets, carbon gas, can rings, tires, grain binds, shoes, dryer, candy, chair, and freight forwarder traffic designated as miscellaneous freight. The shipments ranged in weight from 100 pounds to in excess of 41,000 pounds. An abstract of representative shipments handled in interline service between vendor and vendee during 1962, at Nesbitt, containing more than 2,500 shipments, shows that the great bulk of traffic transported consisted of miscellaneous freight forwarder traffic, in lots of 20,000 pounds or greater. This traffic was handled by the interchange of equipment, rather than the transfer of lading from one vehicle to another. During the first five months of 1963, vendor received from vendee revenues of $9,450 on account of such interchanged traffic. Vendor's total

revenues for the same period from all his operations were $40,174.

Deaton was organized in 1936 and has operated continuously since that time. It operates 262 tractors, of which 62 are owned, and 398 trailers, of which 268 are owned. The equipment not owned by vendee is leased from owner-operators on a long-term continuing basis. It maintains terminals at Anniston, Birmingham, and Mobile, Ala., Atlanta and Savannah, Ga., Natchez, Miss., New Orleans, La., Tampa, Fla., and Memphis, Tenn. Its general offices, warehouses, and maintenance shops, are located at Birmingham. It employs 75 drivers and 80 administrative personnel. In Memphis, it maintains an office, terminal manager, billing clerk and dispatcher, and has parking space for its trailers. Usually it stations 10 to 14 pieces of equipment at Memphis, including flatbed trailers with removable sides, and van type vehicles. It conducts a substantial transportation service to and from Memphis. From July through December 1962, it handled about 400 shipments weighing a total of 11,830,905 pounds which produced net revenues of $56,453. The majority of its shipments were truckload quantities. Among the commodities transported were asphalt shingles, roofing, steel reinforcing bars, steel drums, steel beams, pipe, steel sheets, cast iron pieces, reinforcing bars, sod, wire nails, bolts and nuts, piling, payloader, tractors, pipe fittings, and asphalt siding. In addition, vendee has interlined shipments with vendor to and from Memphis since the fall of 1959, as heretofore indicated. If the proposed transaction is approved vendee could conduct the present joint-line service with vendor as a single-line service under its unified authority and it would also serve the other points authorized under vendor's Sub-No. 3 authority. The single-line operation would allow vendee to effect a more economical and efficient operation to and from Memphis. It estimates

that had it operated vendor's rights in connection with its own during 1962, its revenues would have been increased by $43,722, to $5,995,319, and that substantial savings could have been achieved in such items as transportation costs, terminal expenses, insurance, and safety, resulting in total net income of $199,036, before provision for taxes, and after taxes $141,699. The net income attributable to the acquisition of vendor's rights would have been $2,622 annually and if this estimate is correct vendee should be able to dispose of the purchase price of $10,000 in less than four years. It is concluded that the purchase price is reasonable and that any fixed charges resulting therefrom would not be contrary to the public interest. Vendee would offer employment to vendor's drivers in the event they become unemployed as a result of the transaction. Vendee regards it as most important to its future welfare to be able to serve Memphis in the type of traffic involved. Provided there is no restriction against the tacking of the Lambert-Marks Sub-3 authority with vendee's presently held general commodity authority in Sub-Nos. 182 and 203, vendee would have no objection to a restriction against tacking any of the other specific grants of authority. Generally, restrictions against tacking of operating rights create undesirable problems of interpretation and are not looked upon with favor by the Commission unless required by the public interest. The hearing examiner is not convinced that restrictions against tacking should be imposed in this case. **Patz—Purchase—White Truck Line, Inc., 65** M. C. C. 654.

As indicated, Nesbitt is an off-route point appurtenant to vendor's Memphis-Savage route and in conducting operations to and from that point it is required to operate over the route to which the off-route point is appurtenant. For example, operations from Nesbitt would have to be conducted over an unnumbered highway to

the junction with Misssissippi Highway 301 and thence to Memphis. It would not, however, be necessary for such operations to be conducted through and via Eudora in serving the off-route point. Since Deaton commenced interchanging primarily truckload shipments with vendor at Nesbitt. he has transported the shipments over U. S. Highway 51 or a part of the route he would retain between Memphis and Lambert. Not having but a single right to operate over this route, Deaton, if the transaction proposed were approved and consummated, would not be authorized to operate over U. S. Highway 51, but would be compelled to use the Memphis-Savage-Nesbitt route generally over Mississippi Highway 301 and the findings will be conditioned accordingly.

Protestants.

Eagle operates pursuant to certificates issued in No. MC-73165, and Sub-Nos., as a motor common carrier, of general commodities, with exceptions, over irregular routes, as pertinent, from points in Tennessee to Birmingham, and points within 10 miles thereof; cast iron pressure and soil pipe, from Birmingham to points in Iowa, Kansas and Missouri (except St. Louis); iron and steel articles, from Birmingham, and points within 10 miles thereof, to points in Illinois, with exceptions, points in Ohio, with exceptions, points in Missouri, Iowa, Kansas, Michigan, Wisconsin, and Kentucky, except Louisville; clay products, from Cordova, Ala., to points in Tennessee; contractors' outfits and equipment, between Bessemer, Ala., and points within 100 miles thereof, on the one hand, and, on the other, points in Tennessee. It maintains terminals at Birmingham and Memphis, with two employees stationed at the latter point. It employs a total of 225 persons in its system, including five freight solicitors. It presently deadheads about 50 percent of its equipment from Memphis back to the Birmingham terminal. It operates 186 tractors

and 287 trailers of various kinds. It provides its own maintenance facilities for equipment and employs a full time safety director. From January 1 through May 31, 1963, it transported in excess of 100 shipments weighing a total of 4,155,203 pounds from Memphis to points in Alabama. The majority of these shipments exceeded 30,000 pounds in weight. The commodities included urea crystal, tile, scrap iron, roofing asphalt, bolts, steel, cleaning compounds, a tractor, and asbestos paper. Eagle presently finds it difficult to obtain traffic from Memphis to Birmingham and feels that it should not have any additional competition in this area. It recognizes vendee as a competitor in the transportation of specific items, but not of general commodities, except freight forwarder traffic. Much of its equipment used in movements to and from Memphis consists of flat-bed trailers which are particularly suitable for hauling heavy commodities, rather than general commodities. Its business in Memphis has improved during the past three years, but it still believes that any additional competition might affect it to the extent that it might close its terminal there. In 1962, its overall revenues were $3,042,000. Its operating ratio in 1962 was 96.4, and has improved in 1963.

Malone operates pursuant to authority issued in No. MC-75840, and Sub-Nos., as here pertinent, of general commodities with exceptions, over irregular routes, between Memphis, and points in Alabama and Atlanta, Ga. It operates 197 tractors and 260 trailers. In the past it has been aware of competition from Deaton in single-line service but has not recognized it as a competitor in joint-line traffic or in less-than-truckload traffic. Malone employs 200 drivers and 50 administrative personnel. It considers traffic to and from Memphis to be very important to its welfare and believes that a grant of the application would allow vendee to become a vigorous competitor for this business, resulting in the loss of traffic to Malone with

adverse effects to it and its employees. In 1962 its operating ratio was in the low 90's.

Bowman operates pursuant to certificates issued in No. MC-94201, and Sub-Nos., as a motor common carrier, of general commodities, with exceptions, over regular routes, as pertinent, between Memphis and Atlanta, and Birmingham, and maintains terminals at these three points. It has regular teletype communication service between these points and offers second morning delivery between them. It offers daily service five days a week. It owns and operates 357 tractors and 676 trailers, including refrigerators, flats, racks, and converters. On a typical day, June 21, 1963, it transported 39 less-than-truckload shipments from Atlanta to Memphis, weighing 85,548 pounds and resulting in revenues of $794. On the same day, 40 such shipments were moved from Memphis to Atlanta, weighing 287,624 pounds and resulting in revenues of $2,309. It transported seven shipments weighing 6,700 pounds, resulting in revenues of $117 from Memphis to Gadsden. It employs 900 employees, including 30 full-time freight solicitors. It has experienced keen competition from other carriers of general commodity traffic moving between Memphis and Atlanta, but does not recognize vendee as a competitor on less-than-truckload traffic. In its opinion, the granting of the application would deprive it of some traffic moving between Memphis and Atlanta and Birmingham. Generally, it has a favorable operating ratio.

Transcon, insofar as pertinent, operates pursuant to certificates issued in No. MC-110325, Sub-No. 22, as a motor common carrier, over regular routes, of general commodities, with exceptions, between Birmingham and Atlanta, between Memphis and specified points in Mississippi; between Tupelo, Miss., and Birmingham. Transcon's system extends from Atlanta on the east, to points on the West Coast. It maintains numerous terminals and operates

223 tractors, 550 trailers, 351 pickup and delivery units, and 25 service vehicles. It employs 1,640 persons, including 102 at Atlanta, 90 at Birmingham, and 81 at Memphis. It has stationed at Memphis, 24 pieces of pickup and delivery equipment, 24 at Birmingham, and 29 at Atlanta. Its terminal at Memphis includes 48 trailer spots which operate seven days a week and it offers overnight service to Birmingham and Atlanta. In March, April, and May of 1963, it transported substantial amounts of tonnage between Memphis and Tupelo, Birmingham, and Atlanta. Its system tonnage and revenue have increased approximately 100 percent from 1958 to 1962. Its operating ratio for 1962 was 88 and should be approximately the same for 1963. It actively solicits both local and long haul movements and about 65 percent of its traffic in the involved area would be less-than-truckload shipments. It believes that all of the traffic between Memphis and Atlanta and Birmingham would be subject to diversion to vendee if the application were granted, but does not know of any specific traffic which might be lost as a result of approval.

Alabama Express operates pursuant to certificate issued in No. MC-71516 as a motor common carrier, as pertinent, of general commodities, with exceptions, over irregular routes, between points in Alabama within 65 miles of Birmingham, including Birmingham, on the one hand, and, on the other, points in Tennessee; between Mobile, Ala., on the one hand, and, on the other, points in Alabama. It maintains terminal facilities at Memphis including a teletype communication service. In its system, it employs approximately 50 people and operates 141 tractors and 323 trailers. In May, 1963, it transported 44 shipments of general commodities from Memphis to Birmingham and points within 65 miles thereof, and 115 shipments in the reverse direction. It offers overnight service on this traffic. It has not been aware of competition from vendee on less-than-truckload traffic and believes that approval of the appli-

cation might divert some of this traffic from it resulting in adverse effects to it and its employees. It has been actively competing with vendee on the movement of freight forwarder traffic between Memphis and Birmingham.

Hoover operates pursuant to certificates issued in No. MC-78632, and Sub-Nos., as pertinent herein, as a motor common carrier, over regular routes, of general commodities, with exceptions, between Memphis, and Atlanta, and Biringham. It maintains terminals at all of these points. It operates 228 over-the-road tractors, 584 over-the-road trailers, 186 city tractors, 162 city trailers, 175 pickup and delivery trucks, and 21 service vehicles. It offers daily service on both truckload and less-than truckload quantities. In May 1963, it handled 875 shipments, weighing 1,409,583 pounds, from Memphis to Atlanta; 1,723 shipments weighing 1,743,334 pounds from Atlanta to Memphis; 1,012 shipments weighing 1,261,796 pounds from Memphis to Birmingham; 584 shipments weighing 1,365,965 pounds from Birmingham to Memphis. It has been able to transport all of the freight offered to it between these points, but its volume into Memphis exceeds the quantity outbound. It believes that all of the aforementioned traffic is subject to diversion by vendee if the application is approved and that any new service offered by vendee would reduce the volume of revenue currently available to carriers operating in the area and would have an adverse effect on them. It asserts that vendee is not now a competitor for less-than-truckload traffic but would become so upon approval of the transaction.

Cole holds authority under certificates issued in No. MC-73464, and Sub-Nos., as pertinent herein, as a motor common carrier, over irregular routes, of general commodities, with exceptions, between Birmingham and points within 15 miles thereof, on the one hand, and, on the other, points in Tennessee. It maintains numerous termi-

nals on its routes extending from Mobile, on the south, to Chicago, Ill., Detroit, Mich., and New York, N. Y., on the north. One of its larger terminals is located at Memphis. In its system, it operates 125 line-haul tractors and 411 line-haul trailers, and numerous other trucks, tractors, and trailers, of which three tractors, three trucks, and five road trailers are domiciled at Memphis. One freight solicitor is located at Memphis, in addition to the terminal agent. About 25 percent of its traffic between Memphis and Birmingham has been single-line service and the balance interchanged with other carriers. In May 1963, it transported approximately 1,300 shipments inbound to Birmingham from Memphis weighing a total of 2,170,935 pounds and resulting in revenues of $19,299, and approximately 1,400 shipments outbound from Birmingham to Memphis, having a total weight of 2,675,404 pounds and resulting in revenues of $25,259. The shipments consisted of general commodities, including a substantial amount of iron and steel articles. A majority of shipments were less-than-truckload quantities. It has not experienced competition from vendee on this type traffic, and anticipates that a grant of the application would cause some of it to be diverted to vendee. Its operating ratio in 1962, was 93.5 and its revenues were $10,000,000.

Southern holds certificates in No. MC-73688, and Sub-Nos., as pertinent herein, as a motor common carrier, over irregular routes, of structural steel, steel piling, contractors' equipment, concrete pipe, wire, nails, roofing materials, lumber, and iron, steel, culvert, and fabricated metal pipe, between Memphis, on the one hand, and, on the other, points in Arkansas, Mississippi, and Tennessee; scrap metals, and structural steel, from Memphis to points in Louisiana. It maintains offices and a terminal garage at Memphis, and operates 28 tractors, and 45 trailers, of which 33 are flat-beds, nine are pole trailers, two are vans and one low-boy. It employs a freight solicitor. Much of its

traffic is outbound from Memphis and it has had difficulty in obtaining traffic for the return movement. It believes that vendor has not engaged in transporting the commodities Southern is authorized to transport, and that if the application is approved the vendee would create new competition in the area served by vendor with resulting adverse effects upon it. It has not recently served any of the points authorized to be served by vendor but presently competes with vendee on traffic to points in southern Mississippi.

Campbell operates pursuant to certificates issued in No. MC-75320, and Sub-Nos., as a motor common carrier, of general commodities, with exceptions, as pertinent, over regular routes, between Memphis, and New Orleans, La., and Tupelo, Miss.; between Tupelo and Mayhew, Miss.; between Tupelo and Birmingham; between Birmingham and Columbus, Miss.; and between Columbus, Miss., and Mobile, Ala. It offers service to the public five days weekly. It owns and operates 579 trailers, 379 tractors, and 204 pickup trucks. It maintains equipment servicing facilities at Springfield, Memphis, Birmingham and New Orleans, and employs a safety director. Insofar as pertinent, it maintains terminals at Birmingham, Mobile and Tuscaloosa, Ala., and Memphis, which are connected by communication service. The evidence shows that it performs a substantial transportation service between Memphis and Birmingham. It employs four solicitors at Memphis, three at Birmingham and two at Mobile. It had not been aware of any competition from vendee with respect to less-than-truckload traffic moving between these points. Approximately 65 percent of its traffic is less-than-truckload quantities. It believes that approval of the application would create new competition from vendee on the aforementioned traffic although, admittedly, some of the traffic is subject to competition from vendee at the present time. It does not handle any traffic for carloading com-

panies between Memphis and Birmingham. It presently competes with vendee between Birmingham and New Orleans. Its revenues in 1962 were in excess of $18,000,000 and its operating ratio approximately 92.

Gordons holds authority in No. MC-11220, and Sub-Nos., as a motor common carrier, as pertinent herein, of general commodities, with exceptions, over regular routes, between Memphis, and New Orleans, La., and Corinth, and Jackson, Miss.; between Memphis, and Atlanta, Ga., Birmingham, Mobile, and Huntsville, Ala. In 1961, 37 percent of its revenues were derived from truckload shipments, and the remainder from less-than-truckload traffic. In 1962, its operating ratio was approximately 97. It offers service seven days a week throughout the year. It operates 284 road tractors, 709 road trailers, 218 city trucks, 287 city tractors, 200 city trailers, 11 service vehicles, and employs more than 1,000 persons. Insofar as pertinent, it maintains terminals at Memphis, Atlanta, Birmingham, Decatur, Hattiesburg, Jackson, and Mobile. In Memphis it utilizes 34 trucks, 52 tractors, and 36 trailers in pickup and delivery service and employs over 100 persons, including 87 full time mechanics. It offers overnight service between Memphis and Atlanta and Mobile. It employs seven freight solicitors at Memphis, two at Mobile, three at Birmingham, and one at Decatur. It has operated for some years in competition with vendee, but has always considered it to be a truckload carrier and has not recognized it as a competitor for less-than-truckload shipments. It has never transported carloading traffic, but during 1962 it moved substantial amounts of traffic between Memphis, Atlanta, and Birmingham, including both truckload and less-than-truckload shipments. It feels that the motor carrier field is over-saturated at the present time and that there is no need for any additional carrier in the area. It believes that approval of the application would cause some of its traffic to be

diverted, especially the less-than-truckload shipments, with adverse effects upon it. It has interchanged traffic with vendor in the past to points in Alabama and Georgia. It competes with vendee between Birmingham and Memphis on iron and steel articles.

Discussion and Conclusions.

It is clear from the evidence that vendor has performed transportation under his rights continuously and to a degree commensurate with his abilities and the demands for his services. Moreover, vendor and vendee have interchanged a substantial amount of traffic at Nesbitt, and it is well established that where such interchange has occurred in the past, the single-line service which would result from unification of the rights would not be a wholly new service. See **Transcon Lines—Purchase—B&M Exp., Inc.**, 75 M. C. C. 693; **Jones—Control and Merger—Clifford**, 85 M. C. C. 603. Protestants' opposition to the application is based largely upon their apprehension that acquisition by vendee of a portion of vendor's rights would result in loss of their traffic and adversely affect them in their operations. Denial of a section 5 application is not warranted on a mere showing that the vendee will be in competition with existing carriers in the absence of evidence showing the effect granting the application would have on their traffic and revenues. **Pacific Freightlines**, 55 M. C. C. 625. A new single line service by vendee would not necessarily make intolerable inroads into the traffic of protestants who are well established competitors and generally are authorized to serve extensive lines and areas. **Super Service—Purchase—Hayes**, 57 M. C. C. 715. Protestants are required to show with particularity just how much traffic they would lose and to what degree their operations would be harmed by approval of a section 5 transaction. **New Dixie—Control—Jocie**, 75 M. C. C. 659; **Palmer Lines, Inc.—Control and Merger—Moody Trans-**

portation Company, Inc., 87 M. C. C. 160. It is to be expected that competing carriers may be affected to some extent by any unification of rights of two carriers, but this is not, in and of itself, a valid objection to approval of a section 5 application. In the instant transaction, the protestants have not submitted evidence of any specific traffic which would likely be diverted from them as a result of approval of the instant transaction or that such a unification of rights would affect them financially to the extent they would be unable to provide the service required of them as public carriers. It is clear that the proposed transaction would enable vendee to provide better service to the shipping public, with greater economy, by substitution of single-line service for the present joint-line service. The proposed single-line service is not new competition to existing carriers except to the extent that it might be more attractive to certain shippers. It obviously would be of substantial benefit to vendee and the shipping public. The purchase price would appear to be reasonable in the circumstances; any fixed charges resulting from the transaction would not be contrary to the public interest; and no employees would be adversely affected. It is concluded that the application should be approved as consistent with the public interest.

Findings and Order.

The hearing examiner finds that the purchase by Deaton Truck Line, Inc., of a portion of the operating rights of Edward Darby Lavender, doing business as Lambert-Marks Express, and the acquisition by Deaton Truck Line, and in turn by the executors of the estate of Edwin M. Sellers, deceased, and Dorothy S. Sellers, of control of such rights through the purchase, upon the terms and conditions previously set forth herein, which terms and conditions are found to be just and reasonable, constitute a transaction within the scope of section 5 (2) (a) and

will be consistent with the public interest, and that, if the transaction is consummated, Deaton Truck Line, Inc., will be entitled to operate under the rights granted in No. MC-108220, Sub-No. 3, which rights are herein authorized to be unified with rights otherwise confirmed in it and to be embraced in a certificate to be issued in its name, with duplications eliminated, **provided, however,** that, if the authority granted herein is exercised, the operating rights to be acquired by Deaton Truck Line, Inc., shall be restricted to preclude the transportation of any commodities or to conduct operations between Nesbitt, Miss., and Memphis, Tenn., over U. S. Highway 51.

Premises considered, it is the Order of the Hearing Examiner that:

The purchase by Deaton Truck Line, Inc., of Birmingham, Ala., of a portion of the operating rights of Edward Darby Lavender, doing business as Lambert-Marks Express, of Marks, Miss., and the acquisition by Deaton Truck Line, of Livingston, Ala., and in turn, by the executors of the estate of Edwin M. Sellers, deceased, and Dorothy S. Sellers, both of Birmingham, Ala., of control of the operating rights through the purchase be, and they are hereby, approved and authorized, subject to the terms and conditions herein set forth.

If the parties to the transaction herein authorized desire to consummate same, they shall (1) promptly take such steps as will insure compliance with sections 215, 217, and 221 (c) of the Interstate Commerce Act, and with the rules, regulations, and requirements prescribed thereunder, and (2) confirm in writing to the Commission, immediately after consummation, the date on which consummation has taken place.

If the authority herein granted is exercised, Deaton Truck Line, Inc., shall submit for consideration and ap-

proval a sworn statement, and one copy thereof, showing all expenditures made, by dates, or to be made, in connection with the transaction authorized, including the consideration, legal and other fees, commissions, witness fees, and any other costs incidental to the transaction, the assets acquired and the liabilities assumed, indicating the account number and title to which each item has been or is to be debited or credited.

Henceforth, unless otherwise ordered, Deaton Truck Line, shall be considered as a Class I common carrier by motor vehicle and shall be subject to the provisions of sections 204 (a) (1) and (2) of the Interstate Commerce Act, so far as they relate to accounts, records, and sections 214 and 220 of the act and to rules and regulations promulgated thereunder.

The authority herein granted shall not be exercised before the date of service of a notice or order stating that this recommended order has become the order of the Commission.

Unless the authority herein granted is exercised within 90 days from the date of service of such notice or order, this order shall be of no further force and effect.

The recital herein of balance sheet and other financial data shall not be construed as approving accounting methods which have been followed or expenditures represented thereby.

By the Commission, David S. Letts, Hearing Examiner.

Dated at Washington, D. C., this 27th day of November, A. D. 1963.

Harold D. McCoy.
Secretary.

(Seal)

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 447

ALABAMA HIGHWAY EXPRESS, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court, which affirmed the Commission's approval of the application of Deaton Truck Line, Inc. (Deaton), pursuant to Section 5(2)(a) of the Interstate Commerce Act (49 U.S.C. § 5(2)(a)), to purchase a portion of the motor carrier operating rights of Edward D. Lavender (Lavender). Appel-

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lants are motor carriers which appeared as protestants in the Commission proceedings.

Lavender's interstate operating certificate sought by Deaton authorized services between Memphis, Tennessee, and Savage, Mississippi, over a prescribed regular route, and also service between Memphis and the off-route point of Nesbitt, Mississippi, less than 20 miles from Memphis (J.S. 23a). Deaton held interstate certificates authorizing the transportation of general commodities over irregular routes between Atlanta, Georgia, and Birmingham, Alabama, on the one hand, and points in Mississippi on the other. In 1959 Deaton and Lavender began interlining general commodity shipments to and from Memphis at Nesbitt, thus providing an irregular-route service between Memphis and Birmingham and Memphis and Atlanta. (J.S. 15a–16a). To operate between Nesbitt and Memphis over the prescribed regular route between Savage and Memphis, it is necessary to travel over secondary roads, one of which is unpaved. Since the shortest practicable route between Nesbitt and Memphis is U.S. Highway 51, Lavender used Highway 51 rather than the prescribed regular route between Memphis and Savage for this traffic (J.S, 14a).

In 1963 Deaton sought Commission approval to acquire Lavender's certificate and thereby replace the Deaton-Lavender interline with single-line service by Deaton to and from Memphis. Appellants argued that there had not been sufficient authorized service under Lavender's certificate; that the interline service over U.S. Highway 51 was not authorized by the certificate; and that therefore the certificate was dormant

and not transferable (J.S. 11). The Commission rejected this argument, finding that Lavender's off-route service over Highway 51 was within the authorization of the certificate (J.S. 14a), and approved the purchase. However, the Commission imposed the condition that the certificate be redescribed in irregular route terms. The effect of this was to authorize Deaton to use Highway 51 (J.S. 15a–16a), as Lavender had.[1] In addition, the Commission limited the irregular-route authority newly conferred on Deaton to service between those towns which previously had been served by Lavender's regular-route operation (J.S. 16a).[2]

The court below unanimously sustained the Commission's order, holding that the Commission had not exceeded its authority in requiring a redescription of Lavender's certificate or in finding that Lavender's certificate was not dormant, and that the Commission's

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[1] A regular-route certificate authorizes the carrier to perform service over specifically stated highways between named points. An irregular-route certificate authorizes the carrier to operate between stated points or within named areas over any available route, but limits it to call-on-demand service, in contrast to service performed regularly or on a fixed schedule, which is permitted under a regular-route certificate. See *Transportation Activities, Brady Transfer & Storage Co.* v. *United States*, 47 M.C.C. 23, Commission sustained, 80 F. Supp. 110 (S.D. Iowa), affirmed *per curiam*, 335 U.S. 875.

[2] The Commission also noted that the transportation needs of the small towns covered by Lavender's certificate were not sufficient to support profitable regular-route operations and would be better served by the call-on-demand service provided by an irregular-route authorization, and that redescription of the certificate in irregular-route terms would result simply in continuing the existing irregular-route service previously performed by the Deaton-Lavender interline operation.

findings were supported by substantial evidence (J.S. 6a–9a).

ARGUMENT

This appeal presents no substantial question warranting plenary consideration by this Court.

1. Appellants' contention that Lavender's certificate is dormant because of a lack of sufficient authorized service is without merit. The Commission customarily interprets certificates authorizing service between an off-route point and the terminal as permitting operations over the most direct practicable route between the two points even though such operations involve no movement over the particular roads named in the certificate. *National Transp. Co.—Purchase—North Branford Transport,* 65 M.C.C. 545, 70 M.C.C. 55; *Ferguson Freight Lines, Inc., Modification of Certificate,* 53 M.C.C. 91. Lavender's operations over U.S. Highway 51 were, therefore, within the authorization conferred by his certificate. The evidence of such operations, together with the evidence of Lavender's local service over the certificated route to the extent traffic was available, led the Commission to decide that Lavender's certificate was not dormant (J.S. 13a–14a).[3] The court below correctly concluded

[3] The Commission's rule has long been to preclude transfer of a certificate as dormant "only where the evidence clearly shows that service to and from particular points or areas has been abandoned or discontinued for substantial periods of time and other evidence to overcome the conclusion of dormancy has not been presented." *Central Wisconsin M. Transport Co.—Purchase—Carlstedt,* 85 M.C.C. 305, 308 (1960). Compare *Wooton—Purchase—Columbia Truck Exp.,* 49 M.C.C. 586, 593 (1949), cited here by the Commission.

that the Commission's interpretation of the certificate was reasonable and that the findings were supported by substantial evidence (J.S. 8a–9a).

2. Appellants also contend that the Commission exceeded its authority under Section 5(2)(b) of the Interstate Commerce Act (49 U.S.C. § 5(2)(b)) [4] in requiring that Lavender's certificate be redescribed in irregular-route terms. They argue that the effect is to grant a new and enlarged service without a hearing to determine whether the public convenience and necessity warrant creation of the new service (J.S. 9–10). In fact, however, the Commission's order does not authorize enlarged operations. The Lavender certificate transferred to Deaton is limited to the towns previously served (J.S. 16a). The only consequences of the change to irregular-route status are (1) to *limit* the carrier to a call-on-demand service (a service Lavender was authorized to provide under his regular-route certificate [5]) and (2) to permit continuation, as a single-line operation, of the service previously performed by the Lavender-Deaton interline operation. The only difference between the service previously performed by the interline and single-line operation resulting from Deaton's acquisition of Lavender's certificate is that one carrier is now permitted to perform a service previously performed by two. This is not an enlargement of the pre-existing service. While generally the Commission will not permit a

[4] Essentially, this provision empowers the Commission in a Section 5 proceeding to impose such terms, conditions or modifications as it finds to be just and reasonable.

[5] *Motor Common Carriers of Property—Routes and Service*, 88 M.C.C. 415, 435 (1961).

carrier to tack its own regular and irregular route certificates together to create a new service more extensive than previously existed (see *Shein* v. *United States,* 102 F. Supp. 320 (D.N.J.)), Deaton does not here seek to join two of his previously held certificates to create a new service, but, rather, by acquiring Lavender's certificate, to continue an authorized service, merely converting it from an interline operation to a single-line operation.

CONCLUSION

For the foregoing reasons, we respectfully submit that this appeal presents no substantial question and that the judgment of the district court should be affirmed.

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